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95-615

Supreme Court, U.S.
FILED
OCT 16 1995
CLERK

NO. _____

In The
Supreme Court of The United States
October Term 1995

JOHN RAUCKHORST,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari From The United States Court of Appeals For The Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

***Edward F. Marek (#0032180)**
The Brownell Building
1340 Sumner Court
Cleveland, OH 44115

(216) 363-1333

***Counsel of Record**

LEGAL ADVANTAGE - Advocates in Appellate Services
432 Walnut Street * Suite 200 * Cincinnati, OH 45202
(800) 581-2252

43 pp

QUESTIONS PRESENTED FOR REVIEW

1) WHETHER THE COURT OF APPEALS ERRED IN FAILING TO DETERMINE WHETHER PROSECUTORIAL MISCONDUCT OCCURRED AND IN HOLDING THAT, IF IT DID OCCUR, THE CONDUCT DID NOT DEPRIVE PETITIONER OF A FAIR TRIAL.

(2) WHETHER PETITIONER WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY HIS TRIAL COUNSEL'S JOINT REPRESENTATION OF PETITIONER AND A CODEFENDANT WHEN AN ACTUAL CONFLICT OF INTEREST EXISTED WHICH HAD AN ADVERSE AFFECT ON PETITIONER'S DEFENSE.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

JOHN RAUCKHORST
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

John Rauckhorst respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-6a) is unreported. The court of appeals entered its judgment on May 22, 1995. The mandate issued on June 13, 1995. On August 9, 1995, an extension of time within which to file for a writ of certiorari was granted to and including October 19, 1995 (App., *infra*, 8a).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTION PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY AND BASIS FOR FEDERAL JURISDICTION BELOW

Petitioner John Rauckhorst and codefendants Michael Slain and Douglas D. Duker were convicted on October 18, 1993, after a jury trial in the United States District Court for the Northern District of Ohio of five counts of mail fraud (18 U.S.C. § 1341), one count of interstate transportation of money obtained by fraud (18 U.S.C. § 2314), one count of securities fraud (15 U.S.C. § 78j(b) and 78 ff) and one count of conspiracy to commit the foregoing offenses (18 U.S.C. § 371). The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

On March 29, 1994, petitioner was sentenced to 27 months imprisonment, three years supervised release, 2400 hours community service and ordered to pay $80,000 restitution. Petitioner's offense level, as calculated under the sentencing guidelines, was 18 (27-33 months imprisonment). This calculation was based on 10 offense levels for the amount of fraud loss. No points were assigned by the district court concerning petitioner's role in the offense. U.S.S.G. §§ 3B1.1, 3B1.2.

At the same sentencing hearing and represented by the same attorney as petitioner, codefendant Michael Slain was sentenced to 18 months imprisonment, three years supervised release, 2000 hours community service and ordered to pay $80,000 restitution. The amount of fraud loss calculated for Slain under the sentencing guidelines (10 offense levels) was the same as for petitioner. However, at the request of defense counsel Slain's offense level was reduced three levels to level

15 for his minimal or minor role in the offense.[1] U.S.S.G. § 3B1.2. Duker was represented by separate counsel at the sentencing hearing and did not appeal his conviction or sentence.

Petitioner filed a timely appeal to the United States Court of Appeals for the Sixth Circuit, which court upheld the judgment and conviction on May 22, 1995. Jurisdiction was present in the court of appeals. 28 U.S.C. § 1291. On appeal, petitioner and codefendant Michael Slain were represented by the same attorneys. However, appellate counsel did not represent petitioner in the district court. As noted, petitioner and Slain were represented in the district court by the same attorney.

On appeal to the Sixth Circuit, petitioner argued that he was denied a fair trial under due process of law because of misconduct by the prosecutor during final argument and in eliciting from petitioner's former attorney, who testified as a government witness at trial, prejudicial information protected by the attorney client privilege. The court of appeals did not address the merits of the misconduct arguments, but held that, even if the prosecutor's conduct was improper, it did not rise to the standard requiring a new trial, citing *United States v. Bond,* 22 F.3d 662, 667 (6th Cir. 1994).

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[1]Slain's Judgment and Commitment Order incorrectly describes a three point reduction for acceptance of responsibility. The transcript of the March 29, 1994, sentencing hearing, which was not part of the record before the court of appeals, demonstrates that the district court announced a three offense level reduction for Slain for role in the offense. Counsel in this Court has served a copy of the March 29, 1994, transcript on all parties required to be served in this Court.

Petitioner also argued in the court of appeals that he was denied his Sixth Amendment right to effective assistance of counsel during the proceedings in the district court because his trial counsel jointly represented petitioner and codefendant Michael Slain and that during this representation his counsel had an actual conflict of interest which had an adverse affect on petitioner's defense. The court of appeals held that no actual conflict of interest was shown, citing *Cuyler v. Sullivan*, 446 U.S. 335 (1980). The specific issue of the affect of the alleged conflict of interest of petitioner's attorney on petitioner's sentence was not briefed or argued (oral argument was waived) in the court of appeals.

B. STATEMENT OF THE FACTS

Petitioner, Michael Slain and Douglas D. Duker were indicted by a grand jury for the Northern District of Ohio for multiple counts of mail fraud, one count of securities fraud, one count of interstate transportation of money obtained by fraud and conspiracy to commit these offenses. The indictment arose out of the sale of limited partnership units in FDC Mobile MRI Limited Partnership (FDC Mobile MRI) in which petitioner, Michael Slain and Douglas D. Duker were general partners. The purpose of the partnership was to purchase a magnetic resonance imaging (MRI) machine which would be made mobile through use of a truck and leased to various hospitals. Petitioner and Duker owned Financial Directors Corporation (FDC) which also developed and marketed limited partnerships in other expensive medical equipment (cat scans), which were leased to hospitals.

Slain was president and a major stockholder of a management and leasing company, Trans Mobile Nuclear Corporation (TMN), which was to lease the MRI machine from FDC Mobile MRI and in turn lease the MRI to various hospitals and pay FDC Mobile MRI monthly lease payments.

Petitioner and Duker were on the board of directors and also major stockholders in TMN.

Trans Mobile Nuclear was not acceptable as the operating company for the MRI machine to the seller of the MRI, Diasonics Corporation of California. Diasonics guaranteed a loan obtained from Phoenix Leasing for purchase of the MRI machine. As a result of Diasonics opposition, another company owned by petitioner, Slain and Duker, Combined Imaging Services, Inc. (C.I.S.I.), operated the MRI machine and made lease payments to FDC Mobile MRI.

FDC Mobile MRI limited partnership units were offered to investors through an offering memorandum which represented, in part, that:

- 20 limited partnership units at $40,000 each would be offered for sale to the public to raise $800,000;

- in the event that all 20 limited partnership units were not subscribed to by December 31, 1995, investors money would be refunded; all monies collected would be held in escrow;

- the general partners may, but need not, purchase any unsold limited partnership units by December 31, 1995;

- a downpayment of $500,000 would be made by FDC Mobile MRI for purchase of an MRI machine costing $2,400,000, with a $1,900,000 promissory note to be given for the balance;

- TMN would operate the MRI machine after leasing it from FDC Mobile MRI and in turn lease it to various hospitals.

Five persons purchased six limited partnership units for $240,000. These funds were placed in checking accounts of an attorney employed by FDC and FDC Mobile MRI, Kathryn Shen. These checking accounts were known as the Kathryn Shen Escrow Account or Trust Account.

On May 12, 1986, FDC Mobile MRI, through a company owned by petitioner, Slain and Duker, H & D Medical Concepts, Inc., purchased a MRI machine from Diasonics for $2,465,000. The entire purchase price was financed through Phoenix Leasing Incorporated of San Rafael, California. While Diasonics was a guarantor on the loan, petitioner, Slain and Duker personally, and FDC Mobile MRI as well, were obligated on the promissory note. The MRI machine was leased to C.I.S.I., which operated it in various hospitals in Florida. A second MRI machine was purchased from Diasonics by petitioner, Slain and Duker, and a fourth individual, who operated the machine in Indiana. This MRI was not purchased or owned by a limited partnership.

The government alleged that offering the FDC Mobile MRI limited partnership units to the public was part of a scheme to defraud and to obtain money by false representations and promises. The government maintained that petitioner and his codefendants fraudulently used the $240,000 obtained from investors; purchased the MRI machine before FDC Mobile MRI had obtained $800,000; failed to maintain the $240,000 in escrow and return it to the five investors; failed to make the $500,000 downpayment on the purchase of the MRI machine; and, fraudulently received, through H & D Concepts, $308,000 as a commission on the purchase of the MRI.

Petitioner's defense was that he did not intentionally make, or cause to be made, false statements in the offering memorandum and that he and his codefendants, as general partners, made substantial contributions of resources to FDC Mobile MRI by agreeing to become personally liable on the promissory note for the $2,465,000 purchase price of the MRI machine and through diversion of substantial resources from the more successful mobile MRI machine which petitioner and his codefendants owned and operated in Indiana.

Three days before the start of the jury voir dire, counsel for petitioner and Slain moved *in limine* to prohibit the government from introducing "other offense" evidence pursuant to Rule 404(b), Federal Rules of Evidence, that FDC sold other limited partnerships involving cat scan machines in which petitioner was a general partner in all of these partnerships. Counsel noted that Slain was not involved in any of the cat scan limited partnerships or FDC at the time. In the alternative, counsel moved for a continuance of the trial to allow petitioner and Slain an opportunity to consider retaining separate counsel in light of the government's notice of intention to use other offense evidence.

Counsel noted that his representation of "separate people with *very separate involvement* is going to create a conflict." (Emphasis added). This was a reference to the other offense evidence which the government intended to offer under Rule 404(b). The district court granted counsel's motion *in limine* to exclude the Rule 404(b) evidence "subject to any further hearing before the witness. . . testifies." However, the government introduced testimony from various investors in cat scan limited partnerships who lost money in those ventures.

During the above colloquy, counsel also advised the court that at their arraignment, a magistrate judge advised

petitioner and Slain of their right to separate representation and that they "indicated that they would waive that right."[2]

Five months later at the sentencing hearing, at which both petitioner and Michael Slain were again represented by the same attorney, the district court calculated petitioner's offense level at 18 (27-33 months) and sentenced petitioner to 27 months imprisonment. Counsel did not request that the court consider reducing petitioner's offense level for mitigating role in the offense [U.S.S.G. § 3B1.2], although counsel did successfully urge the court not to add two points for an aggravating role [U.S.S.G. § 3B1.1]. Counsel also failed to request the court to consider reducing petitioner's offense level for acceptance of responsibility.

However, counsel argued that Slain should be given a reduction in his offense level for acceptance of responsibility and/or a mitigating role in the offense under U.S.S.G. § 3B1.2. Counsel argued that Slain accepted responsibility because he attempted to make FDC Mobile

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[2]An examination by counsel in this Court of the relevant portion of the transcript of the proceedings before the magistrate judge indicates that the magistrate judge merely inquired whether counsel had discussed the "possibility of conflicts of interest" with his clients and that if counsel determined at some point that "further action" was required, counsel "will do whatever is necessary." Petitioner made no express waiver either before the magistrate judge or before the district court at the time of the motion *in limine*. However, petitioner did not object to joint representation when the conflict of interest issue was addressed on both occasions. As far as counsel in this Court has been able to determine from an examination of the transcript filed in the court of appeals and inquiry of the court reporters concerning pretrial proceedings which were not transcribed by appellate counsel in connection with the proceedings in the court of appeals, the district court failed to make an inquiry into conflict of interest required by Rule 44(c), Federal Rules of Criminal Procedure.

MRI profitable and accepted responsibility for its failure. No such argument was made on behalf of petitioner.

As to Slain's role in the offenses, counsel argued that "Mr. Slain's role is different than that of Mr. Duker's and Mr. Rauckhorst." Counsel then discussed the differences in roles in much the same manner as he had in Slain's motion for judgment of acquittal or new trial. In discussing these differences counsel acknowledged the conflict of interest problem presented at sentencing by representing codefendants. Counsel stated that it was "a bit uncomfortable to comment upon in a situation in which one counsel represents both [defendants]." The court agreed with counsel that the "role that Mr. Slain has played in this is a different role" and granted a three offense level reduction pursuant to U.S.S.G. § 3B1.2. Thus, Slain was sentenced to nine months less imprisonment then petitioner.

REASONS FOR GRANTING WRIT

1. This case involves failure by the court of appeals to follow decisions of this Court regarding the standard for a fair trial under the Fifth Amendment Due Process Clause when prosecutorial misconduct is shown [*United States v. Young*, 470 U.S. (1985); *Berger v. United States*, 295 U.S. 78 (1935)] and the Sixth Amendment right to effective assistance of counsel when trial counsel has a conflict of interest in representing two defendants in the same trial [*Strickland v. Washington*, 466 U.S. 668 (1984); *Cuyler v. Sullivan*, 466 U.S. 335 (1980)].

2. The case also involves resolution of an important federal question concerning the standard that a criminal defendant must meet to show that an actual conflict of interest adversely affected his defense at trial.

3. The adverse affect of counsel's conflict of interest on petitioner's sentence is fairly included within Question Presented Two within the meaning of Rule 14.1 (a), Rules of the Supreme Court, for this Court to consider the issue even though it was not specifically addressed to the court of appeals as part of petitioner's conflict of interest argument. Counsel for petitioner in the court of appeals, who was different from counsel in this Court, argued that petitioner was denied affective assistance of counsel because of the joint representation and that the conflict of interest was "of a progressive and perhaps not reasonably anticipated nature."

ARGUMENT

I. THE PROSECUTOR'S CONDUCT DEPRIVED PETITIONER OF A FAIR TRIAL BY IMPROPERLY PLACING THE BURDEN OF PROOF ON PETITIONER AND ELICITING INFORMATION PROTECTED BY THE ATTORNEY CLIENT PRIVILEGE.

A. The Prosecutor Improperly Placed The Burden Of Proof On Petitioner.

During final argument the prosecutor improperly shifted the burden of proof to petitioner to produce documents which would demonstrate that petitioner and his codefendants contributed financial resources to FDC Mobile MRI by arguing that petitioner had subpoena power to produce records concerning contributions made to FDC Mobile MRI. Whether petitioner contributed resources to FDC Mobile MRI such as by becoming personally obligated on the promissory note for the purchase of the MRI machine and through diversion of funds generated by a separate MRI machine owned be petitioner, Slain and Duker, and operated in Indiana, to support the Florida MRI machine was relevant

to the issue of petitioner's good faith and lack of intent to defraud.

The indictment alleged a scheme to defraud and to obtain money by false representations made in the FDC Mobile MRI offering memorandum. The government maintained that the purchase of the MRI machine before FDC Mobile MRI had obtained $800,000, the expenditure of $240,000 received from investors, the failure to hold investors money in escrow and to refund the money, and the purchase of the MRI machine without making a $500,000 downpayment was evidence of false representations and a scheme to defraud.

However, in his final argument the prosecutor placed the burden of proof on petitioner to produce evidence that, as general partners, he and his codefendants had made financial contributions to FDC Mobile MRI. This argument was contrary to the court's jury instructions that the defendants were not required to produce any evidence. It influenced the jury's understanding of the governments burden of proof, suggesting that petitioner had a burden to come forward with evidence that he and his codefendants made substantial contributions to FDC Mobile MRI.

The Fifth Amendment privilege against compulsory self-incrimination requires that in criminal litigation the government "in its contest with the individual shoulder the entire load" of proving guilt. *Murphy v. Waterfront Comm'n,* 378 U.S. 52, 55 (1964). More recently this Court reaffirmed that the Due Process Clause requires proof beyond a reasonable doubt.

> "The prosecution bears the burden of proving all elements of the offense charged. . . and must persuade the factfinder 'beyond a

> reasonable doubt' of the facts necessary to establish each of those elements. . . ." (citations omitted) *Sullivan v. Louisiana*, ___U.S.___, 113 S.Ct. 2078, 2080 (1993)

The prosecutor's argument that petitioner had subpoena power to produce records of financial contributions to FDC Mobile MRI improperly shifted to petitioner the government's burden to prove the allegations in the indictment beyond a reasonable doubt.

B. The Prosecutor Elicited At Trial Prejudicial Information Protected by Petitioner's Attorney Client Privilege.

(1) The Court Cautioned The Prosecutor Concerning Privileged Information.

The government called as a witness Kathryn Shen, an attorney employed by FDC, FDC Mobile MRI and petitioner. Ms. Shen's duties included working on partnership agreements. She prepared the FDC Mobile MRI offering memorandum and performed follow-up work for the partnership. Because of the attorney client relationship which existed between petitioner and Shen, prior to Shen's testimony, which was given under an immunity grant, the court cautioned the prosecutor:

> "THE COURT: My ruling would be that communications made to her concerning what should be put in the offering memorandum are not privileged communications. Concerning legal matters and legal advice she may have given them based upon the conversation would be privilege. So I would caution counsel to

proceed on that basis. And if you go beyond that you may object or we'll have a side bar conference. Based upon what counsel said I believe if you stick to what you were saying I think we've got a fine line here and I've got to be careful.

[The Prosecutor]: Yes, your Honor."

Despite this caution, prior to the offending question there were numerous unsuccessful attempts by the prosecutor to elicit clearly privileged communications from Ms. Shen. For example, the prosecutor sought to elicit communications from petitioner and his codefendants to Shen concerning the purchase and financing of the MRI machine; the manner in which the investors contributed money to FDC Mobile MRI; and the nature of the downpayment made to purchase the MRI machine from Diasonics. The prosecutor also sought to have Shen testify whether another attorney working for or on behalf of FDC and FDC Mobile MRI, Greg Steely, had discussed proposed changes to the offering memorandum regarding the purchase of the MRI machine with petitioner, Slain and Duker. These attempts were unsuccessful because the court sustained the defendants' objections to the prosecutor's questions. This was the context in which the prosecutor elicited the prejudicial privileged testimony.

(2) Disclosure Of Privileged Information.

Counsel for petitioner questioned Kathryn Shen as to whether she considered disclosing the changes in the manner in which the MRI machine was purchased to investors by amending the offering memorandum. Shen testified that she discussed correcting the offering memorandum with Greg Steely. Counsel merely asked Shen whether she had

discussed making changes with Steely and whether or not they (Shen and Steely) had "resolved" the matter. Counsel did not inquire into details of the Shen/Steely conversation. Shen testified that she did not recall if she took any steps to inform the investors of changes in the terms of the purchase of the MRI machine.

The court thereafter sustained objections to Shen explaining the content of information conveyed by Steely to Shen; or whether Steely had told petitioner, Duker, and Slain about Steely's discussions with Shen concerning proposed changes to the offering memorandum.

The prosecutor then asked Shen whether she had conveyed her conversation with Steely regarding three proposed changes to the offering memorandum to petitioner, Duker and Slain.[3] She testified that she had. The three proposed changes which Shen discussed with Steely were: (1) all partnership units were not sold by December 31, 1985 and the general partners would contribute the remaining funds; (2) new financing details, such the identity of the lender and interest rates; and (3) that no downpayment was made for the purchase of the MRI machine.

The testimony that Shen advised petitioner, Slain and Duker of her discussions with Steely concerning changes which should be made to the offering memorandum was damaging because it showed knowledge on behalf of petitioner, Slain and Duker that their in-house legal counsel believed (or at least discussed) amending the offering memorandum to disclose to investors changes in the manner

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[3]The context of the question clearly indicates that Shen was asked what she had told *to* petitioner, Slain and Duker. However, the word "to" does not appear in the transcript prepared by the court reporter.

in which the MRI was purchase. This was compounded when the prosecutor asked Shen whether the offering memorandum had been amended. She testified that it had not.

Failure to amend the offering memorandum in light of the information conveyed by Shen to her clients was evidence that petitioner did not make full disclosure to the limited partners and gave rise to an inference that petitioner did not intend to comply with representations made in the offering memorandum, *i.e.*, that a $500,000 downpayment would be made for purchase of the MRI machine; that remaining limited partnership units would be purchased by the general partners or the investors money would be refunded, and that purchase of the MRI machine would occur only after $800,000 was obtained. The central theme of the government's case was that these statements in the offering memorandum, among others, were knowingly false when made.

Testimony of the privileged communication was prejudicial because it showed that petitioner and his codefendants changed the terms of the purchase of the MRI machine to their benefit, were aware that their in-house counsel believed that these changes were significant enough to disclose to the investors through amending the offering memorandum, and that they failed to amend the offering memorandum after receiving this knowledge. The inference of an intent to defraud and making false statements in the offering memorandum was created.

(3) The Communication Was Privileged.

The communication from Shen to petitioner was made during an on-going attorney client relationship. Shen (and Steely) were in-house counsel to FDC, FDC Mobile MRI and petitioner. The question asked by the prosecutor was clearly

designed to elicit a communication from attorney Shen to her clients.

Disclosing what Shen told her clients regarding her discussions with Steely about the need to amend the offering memorandum, also, in effect, disclosed communications from the clients to Shen. The belief by Shen that it was necessary for her to discuss this subject with her clients clearly suggests she believed her clients wanted to receive legal advice from their attorneys whether the offering memorandum should be amended to reflect changes in the purchase of the MRI machine. The communication suggests Shen's clients were at least concerned whether they were in violation of the terms of the offering memorandum because of the changes in the MRI purchase, *i.e.,* no downpayment, the MRI machine was purchased before all of the limited partnership units were sold, and the failure to maintain the limited partnership funds in escrow to be returned in the event all of the units were not sold.

The communication by Shen conveyed legal advice given to a client. By informing her clients about her discussions with Steely, Shen, in effect, gave legal advice to her clients concerning the need to amend the offering memorandum. Advice by an attorney to her clients is within the attorney client privilege. *United States v. DeFazio*, 899 F.2d 626, 635 (7th Cir. 1990); *Matter of Fischel*, 557 F.2d 209, 211 (9th Cir. 1977).

The attorney client privilege protects against forced disclosure of communications from an attorney to her client when made in the course of giving legal advice. *In Re LTV Securities Litigation*, 89 F.R.D. 595, 602 (N.D. Texas 1981) ("lifting the cover of advice will seldom leave covered the client's communication to [his] lawyer"). The scope of the privilege is also reflected in deleted Rule 503(b), Federal

Rules of Evidence (Lawyer-Client Privilege). The proposed rule provided that:

> "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional services to the client, (1) *between himself...and his lawyer...."* (Emphasis added)

There is no limitation in this proposed rule which suggests that the privilege covers information which flows only from the client to the attorney. While the proposed rule was deleted by Congress, it represents the Advisory Committee's understanding of the scope of the attorney client privilege.

In light of the court's caution to the prosecutor regarding Shen's testimony about information covered by the attorney client privilege and the earlier unsuccessful attempts by the prosecutor to elicit privileged information from this witness, the prosecutor's conduct in eliciting the prejudicial privileged information was also reckless or intentional.

C. The Cumulative Effect of the Misconduct Deprived Petitioner a Fair Trial.

Errors that might not be prejudicial when considered alone can amount to a violation of due process and denial of a fair trial when considered together. *Walker v. Engle*, 703 F.2d 959, 963 (6th Cir.), *cert. denied*, 464 U.S. 951 (1983); *United States v. Jones*, 482 F.2d 747 (D.C. Cir. 1973).

The cumulative effect of the prosecutor's misconduct, coupled with the reckless or intentional nature of disclosure

of prejudicial information protected by the attorney client privilege, deprived petitioner of a fair trial.

II PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE PETITIONER'S COUNSEL, WHO JOINTLY REPRESENTED PETITIONER AND A CODEFENDANT, HAD AN ACTUAL CONFLICT OF INTEREST WHICH HAD AN ADVERSE AFFECT ON PETITIONER'S DEFENSE.

A. An Actual Conflict Of Interest Existed Which Had An Adverse Affect on Petitioner's Defense At Trial.

The court of appeals found that petitioner failed to demonstrate an actual conflict of interest. However, petitioner submits that an actual conflict of interest existed as a result of his counsel's joint representation of petitioner and codefendant Michael Slain. The conflict of interest at trial was created by the nature and extent of the government's evidence introduced against petitioner compared to Slain; the evidence was more extensive and incriminating against petitioner than against Slain. This difference is clearly demonstrated by trial counsel's motion for judgment of acquittal or new trial filed on behalf of Slain. In his motion counsel noted:

(1) Slain was not an owner of FDC, the company owned by petitioner and Duker, at the time FDC developed and marketed limited partnerships, including FDC Mobile MRI.

(2) FDC, its principles and Kathryn Shen were responsible for preparation of the FDC Mobile MRI offering memorandum, which the government alleged contained false

statements which fraudulently induced five investors to invest $240,000 in FDC Mobile MRI.

(3) Slain was not an original general partner of FDC Mobile MRI (as were petitioner and Duker), but only became a partner later at the insistence of the seller of the MRI machine, Diasonics, and the financer, Phoenix Leasing.

(4) Petitioner and Duker, not Slain, reported to the investors of FDC Mobile MRI.

(5) Evidence from at least three witnesses was introduced that petitioner and Duker, but not Slain, were general partners in a number of FDC cat scan limited partnerships which were generally unsuccessful.

(6) Slain exercised no supervision over personnel of FDC who were responsible for the FDC bank accounts.

(7) Slain was primarily responsible for the operations of TMN and C.I.S.I.

(8) The absence of evidence that Slain employed brokers and financial consultants in the sale of limited partnerships in FDC Mobile MRI or ever sold any partnership interests in FDC cat scan partnerships.

In sum, counsel argued in his motion that the government treated all three defendants identically and that the government and jury ignored "all the factual distinctions between Slain and his codefendants" noted by counsel in the

motion for judgment of acquittal or new trial filed on behalf of Slain.[4]

The quantative and qualitative difference in the evidence between petitioner and Slain left trial counsel with two options: confront and challenge the evidence against petitioner and Slain separately, with the inevitable prejudicial contrast between the two clients, or ignore the differences in the evidence between the two. Counsel choose the latter course during trial. This choice is demonstrated by counsel's closing argument in which he did not draw the factual distinctions between petitioner and Slain which counsel listed in the motion for judgment of acquittal or new trial filed on behalf of Slain.

Counsel's strategy had an adverse affect on petitioner's defense because counsel failed to challenge individually the greater evidence against petitioner. Counsel did not challenge individually this evidence because to do so would have forced counsel to also challenge and discuss individually the evidence against Slain. In doing that, the sharp contrast in the evidence between petitioner and Slain, which counsel noted in Slain's motion for judgment of acquittal or new trial, would have been apparent and harmful to petitioner.

Counsel's choice to avoid confronting the specific evidence against petitioner, in effect, deprived petitioner of a more aggressive defense, through cross-examination,

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[4]On the same day, November 3, 1993, counsel also filed a separate motion for new trial on behalf of both petitioner and Slain. However, this motion did not mention the arguments concerning the relative weight of the evidence contained in the separate Slain motion.

argument or evidence, as to the government's evidence against him.[5]

When a defendant in a criminal case fails to object to joint representation, as here, this Court requires a showing of an actual conflict of interest that had an adverse affect on counsel's performance in the defense of a client. *Cuyler v. Sullivan,* 446 U.S. 335 (1980). Once this standard is satisfied, prejudice is presumed. *Strickland v. Washington,* 466 U.S. 668 (1984).

The Fifth Circuit has pointed out that "adverse affect" is not the equivalent of "prejudice" for Sixth Amendment effective assistance of counsel purposes. *Nealy v. Cabana,* 782 F.2d 1362, 1365 (5th Cir. 1986). While prejudice requires an analysis of the affect of the conflict of interest on the outcome of the trial, the other test is one of an "adverse affect" of counsel's performance on petitioner's defense. This test is satisfied if petitioner can show some or any adverse affect on his defense.[6] *Id.*

Petitioner has met this test. An actual conflict of interest exists whenever one defendant stands to gain significantly by counsel's adducing probative evidence or

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[5]Moreover, trial counsel was faced with the further dilemma that in potentially unsuccessfully confronting and challenging the more extensive evidence against petitioner, counsel's credibility in the eyes of the jury would suffer and therefore his challenge to the evidence as it related individually to Slain would also suffer.

[6]*Nealy v. Cabana* rejected the Fifth Circuit's earlier test in *Baty v. Balkcom,* 661 F.2d 391 (5th Cir. 1981), *cert. denied,* 456 U.S. 1011 (1982), which held that this Court's decision in *Cuyler v. Sullivan* did not require proof of an adverse affect in addition to proof of an actual conflict of interest. However, the *Nealy* court noted that the different standards may not occasion different results. *Nealy v. Cabana,* 782 F.2d at 1365.

advancing plausible arguments damaging to the defense of a codefendant whom counsel is also representing. *United States v. Carr*, 740 F.2d 339, 348 (5th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985). Because of the difference in the nature and quantity of evidence against petitioner and Slain, as set forth in Slain's motion for judgment of acquittal or new trial, counsel had an actual conflict of interest during his joint representation of his two clients which had an adverse affect on petitioner's defense at trial as shown above.

B. When An Actual Conflict Of Interest Exists, Prejudice Is Presumed When The Conflict Adversely Affects Petitioner's Defense Without Showing That The Result Of The Proceedings Would Have Been Different.

As shown here, an actual conflict of interest existed during counsel's joint representation because of the substantial disparity in evidence between petitioner and Slain and counsel's strategy in dealing with the evidence.

When a criminal defendant has shown an actual conflict of interest arising from the joint representation of codefendants by the same attorney in a single trial, an important federal question is raised which should be settled by this Court. Must the defendant demonstrate any or some conceivable adverse affect on his defense, as held by the Fifth Circuit in *Nealy v. Cabana*, 782 F.2d at 1365, or must the defendant meet a more rigorous test by showing a reasonable probability that, but for counsel's conflict of interest, the result of the proceeding would have been different? In this context, a reasonable probability is a probability sufficient to undermine confidence in the guilty verdict. *Strickland v. Washington,* 466 U.S. 668, 694-95 (1984).

Petitioner submits that this Court should address this issue, which was not squarely addressed in *Strickland v. Washington*, 466 U.S. at 692. This Court should adopt a standard that prejudice is presumed when a conflict of interest has some affect on petitioner's defense or impaired the presentation of the defense. This is the position taken by the Fifth Circuit in *Nealy v. Cabana, supra.* A more rigorous test, such as applied to traditional ineffective assistance of counsel claims, would fail to recognize the prejudice inherent in joint representation of codefendants in the same criminal trial.

C. Petitioner Was Denied Effective Assistance Of Counsel At Sentencing.

Petitioner recognizes that this Court does not ordinarily consider questions not specifically passed upon by the lower court. However, this rule is not jurisdictional, nor inflexible. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697-98 (1984); *Youakim v. Miller*, 425 U.S. 231, 234 (1976). The existence and affect of a conflict of interest at sentencing was not specifically addressed below by petitioner's appellate counsel (who were different than counsel for petitioner in this court); however, the conflict of interest issue insofar as it denied petitioner effective assistance of counsel at trial was presented to the court of appeals.

As a matter of fairness and as an issue fairly included within the issue presented to the court of appeals and in Question Presented Two in this Court, it should be considered by this Court at least to the extent of vacating the judgment below and remanding the case to the district court for consideration of this claim. *Youakim v. Miller*, 425 U.S. at 234.

At the sentencing hearing, counsel himself recognized the conflict "in a situation in which one counsel represents both [defendants]" in arguing, successfully on behalf of Slain, the relative role in the offenses of conviction of one client compared to another client represented by the same attorney.

The conflict of interest from this dual representation affected petitioner's sentence. First, counsel did not request the district court to reduce petitioner's guideline offense level for acceptance of responsibility, as he had done for Slain, based on the same rationale advanced for Slain's *i.e.,* Slain tried to make the partnership profitable and accepted responsibility for its failure. The court never had an opportunity to consider a reduction in the guideline offense level for petitioner based on this argument.

Second, counsel did not argue that petitioner should also receive a reduction in his guideline offense level for mitigating role in the offenses. A reasonable inference is that counsel did not argue for a two, three or four level reduction for mitigating role for petitioner because it would have diluted the same argument, and counsel's credibility in making it, on behalf of Slain.

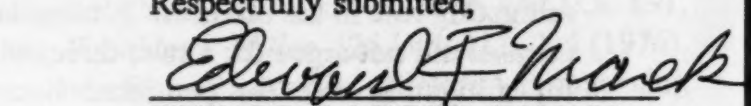
The district court noted a difference in roles and granted Slain a three offense level reduction, with the result that Slain's prison sentence was nine months less than petitioner. Even if the district court's finding of a "difference in roles" could be justified by the record, petitioner was entitled to an advocate, unhampered by representing a codefendant, to argue for a reduction for role, or acceptance of responsibility (on the same theory as counsel advanced on behalf of Slain). And, even though the court may have found a "difference in roles" between petitioner and Slain, the court could have awarded petitioner a two, instead of a three, offense level reduction for mitigating role.

CONCLUSION

Petitioner argues that the United States Court of Appeals for the Sixth Circuit has erroneously ruled on issues presented to it with the result that the court failed to properly apply decisions of this Court. Petitioner also argues that his petition presents an important federal question left undecided by *Strickland v. Washington*, *supra*, regarding the extent of adverse affect which a criminal defendant must show resulted from a conflict of interest by his counsel.

Petitioner's conviction was in violation of the Due Process Clause of the Fifth Amendment and his conviction, as well as his sentence, were in violation of the effective assistance of counsel requirement of the Sixth Amendment. The petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,



EDWARD F. MAREK #0032180
The Brownell Building
1340 Sumner Court
Cleveland, Ohio 44115
216/363-1333
Counsel for Petitioner

APPENDIX A

NOT FOR FULL-TEXT PUBLICATION

No. 94-3500

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	) On Appeal From The
	) United States District
v.	) Court For The
	) Northern District
JOHN RAUCKHORST and	) Of Ohio
MICHAEL SLAIN	)
	)
Defendants-Appellants.	)

Before: MILBURN, RYAN and GODBOLD*, Circuit Judges.

GODBOLD, Senior Circuit Judge. The appellants appeal from their convictions for mail fraud in violation of 18 U.S.C. § 1341, transportation of stolen goods in violation of 18 U.S.C. § 2314, securities fraud in violation

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*The Honorable John C. Godbold, United States Circuit Judge for the Eleventh Circuit, sitting by designation.

FACTS

The appellants, along with a third defendant, Douglas Duker, wholly or in part owned three companies: Financial Directors Corporation (FDC), Trans Mobile Nuclear (TMN), and H & D Medical Concepts. FDC engaged in the business of creating partnerships to be sold as investments for third party investor. The defendants, through FDC, created and managed FDC Mobile MRI. FDC Mobile MRI was an Ohio based partnership whose purpose was to purchase mobile magnetic resonance imaging (MRI) machines that would be leased to TMN, who in turn would lease the machines to hospitals in Florida. To establish FDC Mobile MRI, 20 limited partnerships would be sold to investors for $40,000 each. Although twenty investors were sought, only five investors actually made the $40,000 investment. The offering memorandum stated that the money would be deposited in an escrow account and, if all of the money was not raised by a certain date, the defendants, as the general partners of FDC Mobile MRI, would either purchase the unsold partnerships or return the money to the investors. The investment money was not placed in an escrow account, nor did the defendants purchase the unsold partnerships or return the money.

Prior to actually having 20 investors and contrary to the offering memorandum, FDC Mobile MRI purchased MRI equipment form a California manufacturer, Diasonics, Inc.[1] H & D Medical Concepts formed a distributorship agreement with Diasonics whereby H & D would receive a commission of over $300,000 from the purchase and sale of the equipment to FDC Mobile MRI. According to the invoice, FDC Mobile MRI was billed for the purchase, and

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[1]Phoenix Leasing financed the purchase.

the equipment was shipped to TMN at one of the Florida hospitals. Jt. App. 6 at 1175. The $300,000 commission was sent to the defendants and deposited in the H & D Medical Concepts account. Immediately thereafter, checks were drawn on that account, distributing the $300,000 to the three defendants.

DISCUSSION

The district court properly admitted evidence regarding the financial situation of TMN. Appellants contend that the evidence regarding the financial troubles of TMN was irrelevant and inflammatory. To the contrary, the financial condition of TMN was highly relevant to the issue of fraud since the defendants were inducing third parties to invest large sums of money into the newly formed partnership, FDC Mobile MRI. The offering memorandum, used to sell the investment to the investors, stated that FDC Mobile MRI would purchase the MRI equipment and lease it to TMN. The financial condition of TMN was highly relevant to the issue of whether TMN cold make its lease payments to FDC Mobile MRI; thus the evidence was relevant to the issue of whether the appellants engaged in fraud by not disclosing to the investors the true financial condition of TMN. See U.S. v. Smith, 39 F.3d 119, 121-22 (6th Cir. 1994); U.S. v. Biesiadecki, 933 F.2d 539, 542-43 (7th Cir. 1991); U.S. v. O'Malley, 707 F.2d 1240, 1247 (11th Cir. 1983). Reviewing the admission of the evidence for an abuse of discretion, we find none. U.S. v. Schrock, 855 F.2d 327, 333 (6th Cir. 1988) (standard of review for the admission of evidence is abuse of discretion).

Appellants' motion for a new trial based on allegations of prosecutorial misconduct was properly denied. "[P]rosecutorial misconduct cannot support a grant of a new trial unless it is 'so pronounced and persistent that is

permeated[d] the entire atmosphere of the trial.'" U.S. v. Bond, 22 F.3d 662, 667 (6th Cir. 1994) (citation omitted). Appellants assert three instances of prosecutorial misconduct: (1) arguments made to the court regarding the relevance of evidence of TMN's financial condition, (2) questions posed to Kathryn Shen, the attorney for FDC Mobile MRI, TMN, and the defendants in violation of the attorney-client privilege, and (3) improper statements during closing arguments.

Since the evidence regarding TMN's financial condition was relevant, there is not merit to appellants' first argument. Appellants complain of two questions posed by the prosecutor on redirect to Shen. Objections were made to both questions. The first objection was sustained, the second objection was overruled. Tr. VI, 1037-38. Appellants also moved for a mistrial at that time, which was denied. *Id.* at 1037.

Two statements made by the prosecutor during his rebuttal closing argument were objected to by the appellants. The court sustained the objection to the first statement and admonished the jury to disregard it. The court did not specifically rule on the second statement, but it did give directions to the prosecutor. Overall, the alleged prosecutorial misconduct, if improper, does not rise to the standard requiring a new trial.

The district court denied appellants' motion for judgment of acquittal based on insufficiency of the evidence. This court reviews the decision by viewing the evidence in the light most favorable to the prosecutor to determine whether there is sufficient evidence to conclude rationally that the defendants are guilty beyond a reasonable doubt. U.S. v. Overmyer, 867 F.2d 937, 938 (6th Cir.), cert. denied, 493 U.S. 813 (1989); U.S. v. Steele, 727 F.2d

580, 587 (6th Cir.), cert. denied, 467 U.S. 1209 (1984). After reviewing the exhibits and the trial testimony, we conclude that it was reasonable for the jury to conclude that the appellants were guilty beyond a reasonable doubt.

Appellants contend that they were denied their Sixth Amendment right to effective counsel due to an apparent conflict of interest. The attorneys representing both appellants also represented them jointly at trial with their consent. Slain no argues that most of the evidence pertained to Rauckhorst. Appellants did not raise their argument before or during the trial. "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 348 (1980) (footnote omitted). See also Thacker v. Bordenkircher, 590 F.2d 640, 642 (6th Cir.), cert. denied, 442 U.S. 912 (1979). Appellants have failed to show an actual conflict of interest.

The judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 94-3500

Filed: June 13, 1995

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

JOHN RAUCKHORST; MICHAEL SLAIN

Defendants-Appellants

MANDATE

Pursuant to the court's disposition that was filed 5/22/95 the mandate for this case hereby issues today. Affirmed.

A True Copy.

NO COSTS TAXED:

Attest:

Filing Fee . . . . . .$
Printing. . . . . .$

Total . . . . . $

Deputy Clerk

APPENDIX C

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF COURT

AREA CODE 202
479-3011

August 9, 1995

Mr. Edward Marek
1340 Sumner Court
Cleveland, OH 44115

Re: John Rauckhorst v. United States
Application No. A-125

Dear Mr. Marek:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on August 9, 1995, extended the time to and including October 19, 1995.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk
By
Sandra Elliott Spagnolo
Assistant Clerk